UNIWERSYTET ZIELONOGÓRSKI IN GREMIUM 7/2013
Studia nad Historią, Kulturą i Polityką s. 123-143

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THE SPIRIT OF THE LAW AND EUROPE: THE THEORY OF THE „EXEMPLUM" AND „RECOGNITION"*

Longum iter est per praecepta, breve et efficax per exemplа
(Seneca, *Letters to Lucilius*[1])

Introduction. The problem of representation, or how one may not feel recognised

It could be said that, among all those dates in European history that are laden with significant events, there are two that may be of interest to us here.

First of all, we have been told that the art of painting finally reached a level of worthiness and was raised accordingly to the level of intellectual activity thanks to the work of a Greek artist from the generation of 470 BC: Polygnotus. As far as Polygnotus is concerned, we would like to recall what is told as the fortunate invention of a form of perspective that went beyond the mere representation of isolated figures to reveal the composition of authentic scenes. Through the vehicle of association, the so-called *perspective of Polygnotus*, which probably seems very naïve from a contemporary point of view, brings to mind a very similar perspective used by children today: the different planes that indicate the positions of the characters at different depths are solved by means of small promontories that are at a distance and the horizon amounts merely to a line that shows us the entire field and how far our imagination and sight should see. Surprisingly, the sizes and measurements of the circumstances are maintained in spite of the distance, but they are positioned in hierarchy according to the importance of the figure. This radical difference is not the daughter of chance or the result of

* This work has been developed within the frame of the European research project ENGLOBE (*Enlightenment and Global History*), project included in the *EU 7th Research Framework Programme*, and with support of a *Marie Curie Fellowship* ascribed to the Technische Universität zu Berlin. The Spanish research project „Valores e Historia en la Europa del s. XXI" [Values and History in 21st Century Europe] (FFI2008-04279/FISO) leaded by Dr. Concha Roldán Panadero collaborates in the research trust as well.

[1] [Long is the way that proceeds by precepts, brief and efficient the one by the example] Séneca, Lucio Anneo, *Epístolas morales a Lucilio (t. I)*, VI, 5, Edición bilingüe Latín-Español, Editorial Gredos, Barcelona 1994.

technical rudiments, but rather entirely intentional. Human beings are always bigger than buildings, than furniture and belongings or animals simply because they are also more important. They are the real protagonists. In other words, we are dealing with a convention, a given concept, not the absence of expertise or skill in the use of a new technique. However, the background of the rest of the composition that moves shyly forward like scenography reflects something more.

Apparently, Mikon, who is possibly not so famous, worked alongside Polygnotus and it is said that those who went to the Stoa of Athens commissioned him with a mural representing Marathon's feat, which, as is well-known, appears as one of the most epic achievements of classical Athens. This led to the commission of the painting in the *Stoa Poikilé* itself, taking up the portico that adorned the upper forum in the civic centre of the city, where it could be admired by all those passing by. However, when Mikon completed what was possibly his masterpiece, he was rewarded in a strange way. Instead of being paid, he was fined. According to the Chronicles, the complaint made by all his patrons was that he had painted the Athenians *in a smaller size*. As the persons by whom he had been commissioned were from Athens and well versed in the matter, this leads us to think that Mikon went one step further than Polygnotus and dared to paint the figures that were furthest away in perspective, in accordance with their background, in other words, *smaller*. That must have been what they meant with '*in a smaller size*'. The thinking behind such a surprising phrase was, however, quite evident: the victory scene led to an unforgiveable mistake since, although the eye saw the Athenians as smaller and was aware that it had to do with distance (a matter of triviality in the eye's natural experience), any human being *is perfectly aware* of a person's real size[2]. Common sense tells us that, obviously, the ideas both parties had of what a man was weren't and, of course, couldn't be so different. The mural seems to contradict itself by *not showing a man as he actually is*, when, in fact, *it does indeed show him as he is*. *So, how should a man be represented?* For the stoic, who had already discovered an art of essence and intellect in Polygnotus, Mikon's mural must have been a strange combination of innovation and archaism in equal proportions. Perspective, which was a new concept, was countered in some way by the sensation of impropriety of the differences in proportion of the protagonists the artist had painted. The plastic arts had finally reached a self-understanding and, little by little, as if they were rediscovering the first, original concept of *mímesis*, they had come up with a sentence about it. Imitation [*mímesis*] was the relationship of representation that refers to a model that is used as a comparison. The relationship was a *lógos* [reason,

[2] S. Woodford, *Advances in wall painting: Polygnotus*, [w:] *The Art of Greece and Rome*, 2nd Edition, Cambridge University Press 2004, s. 52-56.

proportion]. Therefore, it was clear that the first place where reason had started to look for itself was again in man and that it was in man where it had found universality in the same movement. Representation used as a vehicle was merely a small tangible inconvenience that had to be avoided. Thus, its particularity became the reason for its oblivion. Furthermore, we had the frenetic experience of Homer's *aedo*, forced to confuse himself with his own poetry. The rhythm, emotion and song referred the attention to the executor and the content of the poetry was nothing more than his incarnation. Representation and the represented entity were combined, rendering the distance between the model and the imitation almost inexistent. As its very name suggests, *enthusiasm* is the poet vanquished by the hero and the god [from *enthousiasmos*, and *entheos/enthous*, literally 'with a god inside'] he addresses. He acts as an intercessor only for his own identification. Here, the relation of imitation, of *mímesis*, eludes the reference to the model since music, song and dance *are* the same actor and *expression* of the drama. Here, in its trade with the body, *mímesis* forgets that the latter is only its mediator and, as far as it is concerned, the relationship of imitation it has with its canon. It forgets that it is only an indicator and this attempted usurpation was probably what must have horrified those who saw the portico. Universality alone can be worthy of becoming a model and it can be reached only on an intellectual plane, a plane which is also more important than that of the *theos âner*, the divine man, who has been so unwise as to lose himself in his exercise of imitation[3]. That is why the Athenians *did not feel recognised*. The background had swallowed up the individual and made him *insignificant*.

The slight inconvenience of this genealogical framework is that, of the two meanings of *mímesis* given here thus far, the second, which appears to be the derived meaning and also carries the burden of justification, is actually the more original[4].

In the context of worship and festival, the content recited by the archaic poet recreates the actions of the hero, which are in no way extravagant or irrelevant. Or to an even lesser extent, improvised. They are nothing more than typical acts that stand as a paradigm. They repeat the tradition of community. As part of its function and its contextual background, *mímesis* does not actually imitate; it does not use a model if we want to be fair and admit the truth in the accusation. However, the accusation itself poses an irrelevant question, since the dramatic actor does not act, but rather he *is* the model itself. There is no reason, no purpose. There is no precept, which is always a rule used to measure reason. Its didactic interest, its prescriptive and political function makes more use of *exemplariness*. Not only the rule in the *logoi*,

[3] J. Gomá Lanzón, *Historia de la imitación* [History of Imitation], [w:] *Imitación y experiencia* [Imitation and Experience], Chapter 5, Editorial Crítica, Barcelona 2005, s. 97.

[4] *Ibidem*.

but also the examples can be models. The stoic spectator has not yet understood the difference between the *symbolon*, which leads from representation to the underside of its meaning and essence (the *theoria*), and the *example*, which does not refer to his essence (*what he is*), but rather to a practical requirement (*what he should be*). Mikon made the mistake of positioning his Athenians in too specific a way, hoping that the context and its relationships would complete the interpretation between sensitivity and intelligibility. With a movement that was to become famous over the following centuries and consequently, that was ahead of its time, he sought to *make perspective significant*[5].

Here, we come to our second event. How lucky we are! The Treaty of Lisbon finally came into effect on 1st December 2009. After only two years of its silent journey, the document designed to "furnish the Union with a stable and lasting institutional framework" (according to the Conclusions of the Council of Europe on 10th and 11th of the same month[6]), is (however) so complex and difficult to manage that one can doubt, first of all, whether or not it has actually come to improve all the previous reforms and, secondly, whether or not it has by chance kept any of their characteristics amidst so much constitutional text. There is no doubt as to the conclusiveness of the opinion given by *The House of Lords* in its report titled *The Treaty of Lisbon: an impact assessment*[7], in which it says with no pity whatsoever toward the document that it is a complicated document, not at all easy to understand for the people it affects, which constitutes [undoubtedly] an obstacle for debate on the foundations of its qualities[8]. Although such a sentence could be put down to the now classic euroscepticism of the British people, it does indeed uncover the fact that the new reform divests the *non grata* European Constitution of its Constitutional covering, which makes many governments sigh with relief at being able to avoid the national referendum on their ratification of the treaty. It also shows that where there has had to be a public vote by constitutional imperative (for example, the Irish government), no satisfactory results have been obtained. The very disposition and the articles of the resulting document is revealing for the judgement made here thus far. Its table of contents has had to include no less than a fourth and final part under the interesting name of *'table of correspondences'*. In short, the work in Lisbon consisted more or less of keeping the text

[5] As it is pointed out in the classic work on perspective by Erwin Panofsky (E. Panofsky, *La perspectiva como forma simbólica* [Perspective as symbolic form], Editorial Tusquets, Barcelona 2008).

[6] The complete text of the Treaty is in: http://eur-lex.europa.eu/JOHtml.do?uri=OJ%3AC%3A2007%3A306%3ASOM%3AEN%3AHTML.
EUR-Lex is the website were the different amendments to European law are posted.

[7] At http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf. This is the pdf version of the document.

[8] *Ibidem*, s. 16.

of the European Constitution, intact and of trying to leave out any reference that was reminiscent of a *carta magna*. So, what did such a job of formal '*deconstitutionalisation*' involve? Although it may come as a surprise, on a rather informal scale, not only did the very name of 'Constitution' disappear, "but also the symbols and all the terminology that might lead citizens to think of the creation of a kind of macro-state"[9].

Once again: divested of qualities, the text cannot be put to debate. It has become an abstract. But the thing did not have to do only with insignias and symbols. For it to have contents, the Charter of Fundamental Rights from the Treaty of Nice had to be used and although it was 'neutralised' and made '*non-binding*', it ended up as Part II of the Constitution. What's more, the rights guaranteed in the European Convention of Human Rights were also included, together with those that came from the constitutional traditions common to the member states. From such an abstract, the Constitution needed to set down its wings on something more tangible. What it finally felt the need to do was to make visible something that until then had been movements in the area of case law before the European Court of Justice and, many times, without it, in the turbid context of the particular constitutional traditions of each state. The members of the Intergovernmental Council *made the mistake of presenting something to their citizens in too abstract a way*. "Until then, European public power, including the member states, had proceeded limited by the fundamental rights configured by force (in other words, by sentences […] [inspired by the various constitutional traditions])"[10]. The Council of Europe of Cologne in June 2009 reached the conclusion that "the current evolution of the Union requires the preparation of a Charter of Fundamental Rights that makes it possible to show the citizens of the Union the great importance of fundamental rights and their scope"[11]. In other words, it requested a position to be taken and a substantive rewriting of the basic content of its rule of law. A fundamental European law, not a macro-state.

European citizens *did not feel recognised* in the present European Constitution. The background had swallowed up the individual, who had been truly belittled. The mural had possibly become intellectual under so much pure rule of law that they no longer saw themselves reflected in it. And the reasons behind such a disagreement seem to depend not so much on legal matters as on matters of representation. Not so

[9] R. Alonso García, *Sistema jurídico de la Unión Europea* [European's Union Legal System], Thomson Reuters, Navarra 2010, s. 51. In fact, the I-8 section in the Constitution was deleted from the definitive text. This was the one referred to *symbols of the Union* as the European flag, the motto (*'Unity in diveristy'*), or the hymn. But all references to the currency (*Euro*), the so-called *Europe's Day* (9th May) and even expressions regarding *'the European law'* were erased in the same way from the text presented as concluded.

[10] *Ibidem*, s. 47.

[11] *Ibidem*.

much on coherence as on content. We will later say that recognition always depends on purely representative elements, in other words, on a certain kind of identification with what is specific and material. Accordingly, we will show that satisfying such demands is not impossible and does not lead to the difficult decision between a coherent and rational legal model that has been put together perfectly and that of attention to detail with the consequent mosaic of *ad hoc* decrees, reforms, amendments and adjustments. There is no reason for it to end in casuistry. We will therefore try to show how, from a *'scientific' legal model*, it is possible to move down to a particular level, in the same way that scientific reasoning has been capable of developing narrative reasoning, which is descriptive and historical, as part of its system of certainties. Thus, to conclude, we will seek to show the possibility of the Constitution only being able to reach such an understanding with citizens, of it reflecting and being reflected in them, whom it supposedly represents, by necessarily referring to the content that is a *common history of Europe*.

I. *The individual as corporation, the action as abstract*

In the possible meaning behind the codification of a legal canon, there are two linked intentions. There is the intention which holds that, through the establishment of the *rule of law*, the *subject of rights and obligations* recognises itself and, with and as a result of said recognition, it is strongly impelled almost necessarily to act accordingly. However, leaving the concept of *rules and regulations* without a more precise character (even though it may appear to be completely resolved) may lead to important error. And there is a substantial difference between the *descriptive* and *prescriptive* senses that may be included in a *rule*, *law*, *norm*, *criterion* or *reason* and how they relate to the concept of *rules and regulations*.

The *spirit of the law* seeks to represent this sense in so much content. From a base of evidence and need supposedly included in the material presupposition of the former, the *law* would have a substantive meaning which, owing to its objectiveness, would lead to its fulfilment under the form of a *good*. The *factual premise*, the *substantive law*, as a *good, must be desired*. In turn, the *formalisation of law* (its *wording*) would produce the required order and consensus in the corpus of proposals it forms and it would introduce the norm through coherence and completeness in so much formal system. Accordingly, the different reasons for the code, its materiality as content and the *goods* it pursues would not contradict each other. The *corpus* will be 'regulated' according to the rules and the concept of *no contradiction* in the choice of the *goods* is another *good* in itself. The force of the rules and regulations that *requires* or *induces* the action or its avoidance is therefore represented as another result of the exercise

of avoiding internal contradictions in the system. The tendency will be to avoid the so-called *corruption of the code*, which is no mean feat: that it does not contain the prohibition and, *at the same time*, the prescription of the same thing. However, we have not left the area of *descriptive* meanings. *One description in particular is capable of operating as prescription.* The question is: *which descriptive content therefore produces prescriptions?*

The culture of example prototypes expires suddenly with the transition from the spoken word to writing, which corresponds to the transition from the specific authenticity of art to the abstract authenticity of philosophy. [That] prototype is an individual law; philosophy, science and Law, which appear at that time, formulate, however, abstract laws […] *Both legal law and scientific law* operate an abstraction of the unique and specific elements of life, eliminated to allow thought to reach the necessity and rationality of concepts[12].

Experience tells us that *logical necessity* (and the inclusion of *objective meanings* is part of it) has never given rise to its *effective* counterpart, no matter how much they share familiarities on a nominal level. They are different species and their ancestors of *self-evident principles*, the *certain foundations* and the *eternal truths* lead only to confusion. The theoretical model developed thus far hides the tacit assumption that contemplation [*theoria*] can necessarily lead to action. However, it overlooks the fact that a model, insofar as it is merely *descriptive*, is nothing more than a representation, and that the type of representation this *pure theory of Law*[13] supposes means that the latter bears the essential features of a *class* or *kind*, in other words, its attributes, at the cost of transforming the content into an abstract ideal. It turns it into an object of knowledge. In time, universality that is attained in this way reverts itself and ultimately denies the particularity from which it came. It is forced to deny its current, particular existence: the prototype *is* de facto and not figuratively, *all its cases*. But of course, the old teaching that holds that a *factual proposal* cannot give rise to the type of *proposal of rules and regulations* sought by Law remains valid. In other words, an *is* cannot be understood as a *should be*[14]. This *description* is not a *prescription*. The *Pure*

[12] J. Gomá Lanzón, *Pragmática de la imitación* [Pragmatics of imitation], [w:] *Imitación y experiencia*, Chapter 14, s. 482.

[13] The main defender and founder of this theory is Hans Kelsen. The first edition of his seminal text of 1934, *Reine Rechtslehre* begins: "It is more than two decades since I undertook the development of a pure theory of law, that is, a theory of law purified of all political ideology and all natural-scientific elements and conscious of its particular character because conscious of the particular laws governing its object. Right from the start, therefore, my aim was to raise jurisprudence, which openly or covertly was almost completely wrapped up in legal-political argumentation [*Raisonnement*], to the level of a genuine science, a science of mind [*Geistes-Wissenschaf*]" (H. Kelsen, *Reine Rechtslehre. Studienausgabe der 1. Auflage 1934,* red. M. Jestaedt, Mohr Siebeck, Tübingen 2008 s. 3) The English version is in H. Kelsen, *Preface*, [w:] *Introduction to the Problems of Legal Theory*, red. B.L. Paulson, S.L. Paulson, Clarendon Paperbacks, Oxford University Press 2007.

[14] Hume is the unavoidable reference in this sense. The *naturalistic fallacy* (named by George

Theory of Law deals with the set of legal proposals as a unified system that should be interpreted in the absence of any reference to individual agents. As it is positive law, this way of conceiving law as a system of proposals that are to be signified, without direct consideration for the activity of those who are considered as the addressees of the rule, may be legitimate for the positivist legal expert (who, on the other hand, deals with a problem that is very limited) but not so for he who asks himself *what law is in general*. *What it represents* and *how* it does it.

The *abstract authenticity* of Law became a basic legal principle in the 18th century. More specifically, during the Enlightenment and with the purpose of establishing the theoretical foundations of the *State of Law* or *of agreement of Law*, which led to the necessary search for an integrating element of Law, which finally took the form of the so-called *principle of generality of Law*. The idea of the law being *general* means that man has been abstracted as an individual within it. As Rousseau said[15] – *'the subjects as corporation and actions as abstract'*, with which he set forth a revolutionary equality independent of social conditions, status and patrimony. In other words, independent of particular circumstances. The *object of the law* is always general and it seems that the *subject of the law* must also be so. Law graciously eludes specifying particularities and takes the form of the suggestion of a *negative factual condition*, suggesting the denial of a particularity, on which it holds that *prescription* should be based.

> In law [the *factual premise* we referred to earlier], it usually takes the following form: "*he who or anyone who* commits murder, theft, fraud...". This "he who" or "anyone who" is an abstraction. [...] The factual premise is a description of an action that is "timeless, spaceless and inexistent"; in other words, the authenticity provides that each citizen should be treated in law as if it had the life of a concept, without consideration of his space-time or personal circumstances[16].

'Normality' is the system formed by 'those who do *not* violate the rule of law'. A community is defined under the rule for what *they do not do* and the content of *positive law* provides *what should not be done*. And, of course, what is timeless, spaceless and inexistent is an ideal coordinate awaiting a case for application. An ideal perspective.

Edward Moore) stresses the argument by which it is logically non-conclusive and a misunderstanding of how *normative propositions* work the assumption that *matters of fact* entail any kind of *moral* or *ethical endeavour*.

[15] *Vide*: J.J. Rousseau, *De la Loi* [Of law], [w:] *idem*, *Du Contrat Social, ou príncipes du droit politique*, Livre II, Chapitre VI, Editions Flammarion, Paris 2010. The tenet in the afore mentioned chapter of the *Contract* is the same that appears in the *Declaration of Human and Citizen Rights* of 1789 in its 6th article. 'Law' is the expression of *general will* and it is the same for all citizens [*la loi est l'expression de la volunté générale* […] *elle doit étre la méme pour tous*]. It represents as *an expression*, the same way *actions* represent the will and intention of citizens. But, as *expression* turns into a*ction*, the *law* has all its effectiveness under the shelter of a will. Unfortunately, the will is particular, not general as in this case. A *general concept* can not be an *expression*, but a *re-presentation.*

[16] J. Gomá Lanzón, *loc. cit.*, s. 484.

In the same content as the *factual premise*, the *law* is forced to describe a conduct and only then can the rule identify and single out an actor. The rule is descriptive on two levels: it points directly, *positively*, to the case of its violation, with no specification other than that afforded by hypothesis ('*he who*' or '*anyone who does X*') and, at the same time, it describes 'normality' *negatively*.

Item perspectiva is a Latin term meaning 'look through', in other words, ignore to a certain extent part of what is seen by sight[17]. The '*best system of Law*' in these cases is the *correct* geometric construction that denies materiality and transforms it into a figurative plane on which and 'through' which a *unitary space* is projected comprising all different things. Although it may seem that we are seeing space, a perspective projection is a technical convention that guarantees "the construction of a completely rational space, in other words, infinite, constant, homogeneous"[18], that is, a space that is simply a conceptual description.

> The homogeneity of geometric space has its ultimate foundation in the fact that all its elements, the 'points' that are closed in it, are simply indicators of position, which, beyond this relation of 'position' [*Setzung*], in which they refer to each other [*coherently*, and] do not possess their own, autonomous content. *Their being ends in their reciprocal relation: it is a purely functional and unsubstantial being*[19].

In exactly the same way as the *factual premises* in the system Law seeks to be. They are positions that are 'ready to be occupied', but they do not have to be and, in theory, the invitation is for them not to be occupied. If what is being sought is content, the content that is found is useful only for positioning the 'points' in relation to each other. That is the negative case. One should recognise that the hypothesis of a *non-criminal* community considers only this type of rule.

In this case in particular and, it could be said, as a result of this diluted character of the hypothetical proposals, *prescription* in law is driven by what is referred to as *legal consequences*, which is what has the character of need, not the description of the case. *If one does not wish to obtain the consequences with necessity*, *then*, one must avoid entering into those described by law, in other words, and in an almost Hegelian way, one must foster the *denial* of the *negative determination* of the *factual premise.*

Then, it must undoubtedly be more complex to try the same adventure with positive, substantive content, such as that which is supposed to be present in a *fundamental right* similar to the one we quoted in the discussion on the Treaty of Nice. *Where will they get any force of prescription from?* Here, in the *fundamental rule*, the description itself needs to be substantive. Unlike the negative law, which points to a unique abstract

[17] E. Panofsky, *op. cit.*, s. 11.
[18] *Ibidem*, s. 12.
[19] *Ibidem*, s. 13-14.

through the conditional form, the positive law establishes the *de facto* existence of a community for its application. If both types of *laws* or *rules* are different in nature, it might be thought that the law of a nation actually brings together *two* nations: the subject of fundamental rights and the hypothetical one.

An action is always particular and defines its actor unequivocally. The question is therefore: *what does the subject of a number of fundamental rights do?* Our answer does not come so much from what he does as *from what has been done in him by another*, which will turn the meaning of the question to a different agent and time.

II. *The judgement and the law. Case law, or the art of universality in particularity*

Perhaps one of the most determining events in the History of Law has been the different incorporation of Roman law in Europe. The *ius romanum*, a law considered as the cultural heritage of the entire West, has been filtered through the generations, encountering different levels of resistance from localisms in most European legal codes. That which is known as *ratio scripta* represented the founded exercise of the same reason, but in the form of *law*. There could be no better candidate for a Universal Law. The systematising drive behind codification, which were allowed in the adaptations of the Justinian *Corpus Iuris Civilis* became more and more attractive for a group of legal experts who recognised the need for adapting the old codes of the people, the special rules, the many exceptions and the privileges in place for only certain sectors of the population (as well as the local administrative rules that had become an obstacle for the administration itself, as well as for trade and travel) to the new nature of social and political relations developed over time in Europe.

The *Code Civil des Français*, positioned between the mass assimilation of the Justinian *Ius* (in Germany) and England's almost complete fireproof reaction to it, known as *Code Napoléon,* stands as a model from which most of the European codes of modern law drew inspiration at one time or another. When he became Prime Consul in 1800, Napoleon commissioned a group of judges with equal representation of the main French traditions of jurisconsults[20]. Those who were called to the meeting

[20] *Vide*: F. Berthier, *Le Code Napoléon*, Facsimile Edition 1870, Elibron Classics 2006. François Denis Tronchet, president of the Tribunal of Cassation at the Consulate, was also avocet at the *Parlement de Paris* in his early years, deputy at the States-General and the National Constituent Assembly and at the Council of the Ancients (Age of the Directory). With Jélix Julien Jean Bigot de Préameneau contributes to the element of *common law* or *ius romanum* (*droit écrit*), while Jean-Marie Étienne Portalis and Jacques Mandeville do the same for the *droit coutumiere* (*jurisprudence*). The commission was leaded by Jean-Jacques-Régis de Cambacérès, second Consul after Napoléon. Also *vide*: G. Rouvier, *Le code Napoléon: Considéré dans ses rapports avec l'ordre social, et avec la législation dont il fait partie* [The Code Napoléon: Considered regarding its relations with the social order and the legislation from

were given the difficult mission of finalising the project for the French Constitution sought by title 9 of the revolutionary Constitution of 1792. Both the *historic law* of the French people (*droit coutumier*) and its Roman sources (*droit écrit*) needed to be brought together in a new text[21]. The history of the systematisation of the code (rather than that of *legal pluralism*) and that of the elimination of feudal particularism do indeed go well together. However, the *absolute reason* is restored under the canopies of *case law*. *Non ratio imperii, sed imperio rationis*, according to the Latin adage, but, *non per praecepta, sed per exempla.* The perfection of the classical and habitual synthesis of French law would have been no doubt impossible without the customary local base of the old legal codes. Rather than move away from the specificity of legal casuistry, law subjected the recourse to whim and private law (*privilegium*) to a natural order of reason that leads to the case being judged (*iuris prudentia*).

Prudence [*phrónesis*] is the power to see the universality *of* particularity.

Case law should not be understood as any isolated application of law, but rather the repeated, constant, consistent and coherent application of law in such a way that it reveals a criterion or general system for applying legal rules. Case law draws inspiration from the purpose of obtaining a consistent interpretation of law in the cases in which reality comes before a judge. In short, what is valued decision after decision is a judgement of one case, which leads to its inclusion as *exemplary* after a ruling has been handed down. The interpretation of law obtained by case law is consolidated on the basis of judgements and is specified on the basis of *sentences* and *rulings*. Law takes shape and connects with particularity through a kind of approval and disapproval, through what has a place in *the spirit of the law* and what does not. The rule can therefore be understood as an *undetermined legal concept*. It must find room for considering the idea that its meaning lies in the way in which (*how*) it has been applied until then. Its objective content is to be found in the set of sentences (and not elsewhere) that have resolved *identical* or *similar cases in the same way* or manner. Of course, there is a slight variation to the successive applications, to the repertoire of court rulings, but it is the same as the variation there may be between the variable cases of a rule, which must not be confused with the rule itself. The difference lies in the fact that, here, the rule does not block out the cases. *Case law doctrine* is simply a legal proposal put forward in one or more sentences. The future decision is based

which it starts], Facimile Edition 1816, Elibron Classics 2005; See also D.M. Aird, *The Civil Laws of France to the Present Time: Supplemented by Notes Illustrative of the Analogy Between the Rules of the Code Napoléon and the Leading Principles of the Roman Law*, Nabu Press, 2010.

[21] Charles the VII[th] had prepared the systematized code by the *'ordennance'* [command] of *Montils-les-Tours* (1454), which had the purpose of collecting the local law around France. It took almost a hundred years to 'codify' the main sources of *droit coutumier* in France. *Vide* also: A. Horne, *The Glory*, [w:] *idem*, *The Age of Napoleon*, The Modern Library, New York 2004.

on the preceding sentences. And that is exactly what has turned the phrase *case law is not science* into an accusation, in other words, the *Science of Law* is not Science[22].

III. *The reflexive judgement as universally specific*

In a certain way, the ever-repeated Kantian *dictum* and emblem of the Enlightenment competes with this idea of *prudence in law*. The modern postulate par excellence positioned subjectiveness as *independent* and *free* and sought respect through an awareness that was capable of giving law to itself. This is a '*self-legislating*' awareness. Since, if all men are singled out as dignified as essentially rational, *'Enlightenment'* must be "using one's own understanding without the need for guidance by another"[23], the *self-legislating ego* considers, to a certain extent, the possibility of thinking *de novo* the entire foundation of law as long as it is rational. And, if it were not, *what need would there be for recovering a law that denies the very essence of Man?* The community of legislators and that of subjects of the law, is the same, which offers a clear explanation of the prescriptive force of the latter: 'guidance by another is not necessary', in other words, we can find the need for the rule in our own consciences and *one always works in accord with the other*.

But one is not primarily a spectator. First of all, a spectator is removed from the immediate relations of his surroundings.

> The child [who] awakens in a world inhabited by adults he views with trust and a feeling of dependence. [He does not need] parents to educate him, approve written laws or decrees that [, what's more] his children could not read: it is sufficient for them to have the persuasive example of their lives and the judgements that have been handed down, approving or disapproving the examples of others' behaviour [also]...[24].

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[22] This is the famous motto of Julius Hermann von Kirchmann. Kirchmann attended the *Juristische Gesellschaft zu Berlin* in 1847 in order to give a lecture called *Die Wertlosigkeit der Jurisprudenz als Wissenschaft*, where outlined the idea that jurisprudence can't be as 'sharp' as a science must be. Contingence and variability impede the codification of a law, for which the model should be one of necessity and stability. Like in *laws of nature.* Evidently the efforts of Hans Kelsen or Ernest von Beling – before him in *Die Lehre vom Verbrechen* (1906) and *Die Lehre vom Tatbestand* (1930) – were in this sense against Kirchmann's idea. The clue is without any doubt in the neokantian background of both of them. *Vide*: S. Cardenal Motraveta, *El tipo penal en Beling y los neokantianos* [The Criminal type in Beling and Neokantians], Editorial PPU, Barcelona 2002.

[23] "Aufklärung ist der Ausgang des Menschen aus seiner selbstverschuldeten Unmündigkeit. Unmündigkeit ist das Unvermögen, sich seines Verstandes ohne Leitung eines anderen zu bedienen" (I. Kant, *Beantwortung der Frage: Was ist Aufklärung?*, [w:] *Berlinische Monatschrift*, Dezember-Heft 1784, s. 481. I have used the digitalized version at http://www.ub.uni-bielefeld.de/diglib/aufkl/berlmon/. The site of the Bielefeld Universität houses the issues since 1783 and to 1811.

[24] J. Gomá Lanzón, *Ejemplaridad pública* [Public exemplarity], Editorial Taurus, Madrid 2009, s. 215. A note should be adressed to Aristotle's epistemic concept of *epagoge* in which an intuition of a particular object as an universal is deemed. In Science, it has the form of *noûs*; *phrónesis* in Ethics, and *Paradigma* [example] in *Poetics* and *Rhetoric*.

However, Kant has discovered another way of accessing universality in the *judgement* that does not depend on the handling of concepts and would explain the inconvenient example of the newborn child that arrives into a community: he has called this form of access *reflexive judgement*.

The *reflexive judgement* is based on the subject, refers to him as the origin and judge and brings the attention of the latter on one individual, on a representation, which aspires to be *shared* because what he who judges in this way aspires to discover in his particular purpose (*representation*, *action*, *rule*…) is none other than the *rule*, *law* or *concept* that enlightens his judgement. This is also *prudence*. The value of the judgement does not end in its particularity, but rather 'postulates' *exemplary validity*, in other words, the purpose of the experience may be unique insofar as it is single, but it contains a universal rule that cannot be put forward under the form of concept (*determining judgement*) and, insofar as it is universal, it also aspires to be recognised and accepted by men in general. It is the "need for the approval by all of a judgement considered as an example of a universal rule that cannot exist"[25]. A *recognition*. Despite the fact that it is subjective, the judgement 'requires' general acceptance and the power that is involved is *imagination*, which is a representative power, and not *understanding*.

Of the three kinds of fields in which one can speak with any propriety of '*example*' (logic, art and morality), it is in the field of morality in which the coincidence between *example* (*exemplum*) and *rule* (*exemplary*) leads practically to its identification. Indeed, in the same way that the *logical example* is its idea and concept, of which it is a copy and imitation, the moral example does not refer, unlike the other two, to an external model or to an independent instance with regard to one's own action (remember the platonic victory over non-imitative *mimesis*), but rather it is always an example of itself, *rule and case at the same time*[26]. It is, in fact, an *action*. Remember then the *aedo*. The *judgement of the exemplary* does not need to be scientific and objective or to aspire to the universality that is written in the categorical imperative of morality, but rather it needs to reach its particular universality as *intersubjectiveness*. This avoids *exemplarities without examples* (*praecepta*, *theoria*, which are not fulfilled), and, insofar as the notion of *'exemplary'* surrounds the search for universality with the aesthetic element, in other words, the search for rules and regulations, the 'example' exceeds

[25] "Eine Notwendigkeit der Beistimmung *aller* zu einem Urteil, was wie Beispiel einer allgemeinen Regel, die man nicht angeben kann, angesehen wird", [w:] I. Kant, *Was die Modalität eines Geschmacksurteils sei*, [w:] *Kritik der Urteilskraft*, §18, [w:] *Werke in zwölf Bänden*, Bd. 10, Frankfurt am Main 1977, s. 156. A parallel way of deeming as universal a judgement as a basis for Kantian Epistemology has been explored in L. Falkenstein, *Kant's Intuitionism. A Commentary on the Transcendental Aesthetic*, University of Toronto Press 2004.

[26] J. Gomá Lanzón, *Ejemplasidad pública*, s. 191.

the mere *is* and becomes a *should be.* We have just come face to face with a *prescriptive description*. The *judge*, the *spectator* now recognise themselves in the example and the example draws on the spectator as if by means of a requirement; that is the *should be*. Just the type of rules and regulations that seem to suit law, one that is capable of operating from recognition, that is none other than an appeal to the subject of law and to the need for or invitation to compliance with the rule: *duty*. The mysterious force of the rule taken here, that *should be*, comes from comparison. The *recognition* puts the subjects on an equal footing because as we are not equal, the knot of law is untied. I am a *subject of law* because, as I am equal, *I am at the same time not equal*, therefore I *should be equal*. Where the prototype can be aesthetically admirable, the example also becomes *imitable* and produces the so-called Kantian *enthusiasm*[27]. An 'example' recovers part of the regulatory character of the aesthetic judgement, positioning the individual as a *should be* for the spectator. The imitable act must of course be recognisable. In general, individuals do not identify themselves with concepts.

There is no exemplarity without recognition, but there is no recognition without representation.

IV. *Man as individual, action as particular*

Modern thought makes a *real distinction between what a human being is* and *what his self is.* This separation always falls on the side of the *self*, the *ego*, in terms of value.

Our most intimate reality, our true being, is that of being a thinking subject that does not identify himself with the human being he represents. That first-person singular does not indicate or single out any defined name or description. It does not refer to any person in particular or to any other type of entity. Consequently, it can refer to universality. Anyone can use it. *The self has no reference* and, as such, it can occupy any position[28]. There is a profound asymmetry between the affirmations I can make *about me* in general (and that can be made symmetrically by an observer from a distance) and the use I can make of the '*self* as *subject*. This '*self* has appeared

[27] Like has set forth Jean-François Lyotard in *L'enthousiasme. La critique kantienne de l'histoire* [Enthusiasm. The Kantian Critique to History], §3. Editions Galilee, Paris 1986.

[28] This is the main theme in the Wittgensteinians *Blue and Brown Books* (L. Wittgenstein, *The Blue and Brown Books*, Blackwell, Oxford 1969). The Wittgenstein's proposal is an advance in the conception of the 'I', as it takes Hume's idea about it (*eliminativism*, there is no thing like an *ego*) and promotes it as a particular type of *expression* (*expresivism*). See in this sense the work of Wittgenstein's disciples N. Malcolm, *Whether 'I' Is a Referring Expression*, [w:] *Wittgensteinian Themes: Essays 1978-1989*, §2 Edited by G. Henrik von Wright, Cornell University Press, New York 1995, s. 16-26; N. Malcolm, *Language as Expressive Behaviour*, [w:] *Nothing is Hidden: Wittgenstein's Criticism of his Early Thought*, Chapter 8, Blackwell, Oxford 1986, s. 133-153; G.E.M. Anscombe, *The First Person*, [w:] *Self-knowledge*, Oxford University Press, Oxford 1994, s. 140-159.

in legislative conception since Modernity. That is why it must be rational, since it is a source of representation and must represent this rational subject. Law must construct the legal framework that recognises this and, accordingly, it can be said that the legal project of Modernity ends: by raising *every human being immediately and as such* to the dignity of egalitarian law and *as* a rational subject. However, this cannot be the end of everything. A human being is not represented only by his species and the history of social struggle does not end with the recognition by law of what one already is. We still have to speak of the recognition of what one wants to be in the egalitarian system, since that abstract space we spoke of earlier is not defined only by its symmetry, but rather, to define itself, it needs (to continue the analogy with *perspective*) "the fundamental directives of organisation (in front of-behind, above-below, right-left) [which] are […] values that correspond [in this case] in a different way"[29]. There is no rigorous identity of place and direction, but rather each place has its own peculiarity and value, in other words, they are anisotropic and heterogeneous.

The idea that a field of vision is subjective is of primary importance, but the subsequent objectiveness (which is the taking of a distance) only makes sense after one has assumed a position in it or in the intellectual construction. *This taking-up of a position is an action and actions are somewhat intransitive.* Recognition always comes before knowledge. I cannot delocalise my action. It is such a serious matter that it affects me entirely and perhaps that explains the fact that, although I can substitute the proposal "I think" with a harmless and impersonal "there is thought"[30], I cannot do the same with "I want", which is none other than the proposal of an action. It cannot be replaced in any way by the impersonal "there is will". "The subject is the subject of thought, but not of will, because he *is* the will"[31]. I cannot imitate a human

[29] E. Panofsky, *op. cit.*, s. 14.

[30] J.V. Arregui, *»Yo pienso« y »yo quiero«. Razones de una asimetría* ['I think' and 'I want'. Reasons of an asymmetry], [w:] *Anales del Seminario de Metafísica*, n. 28, Editorial Complutense, Madrid 1994, s. 212.

[31] *Ibidem*, Wittgenstein's *Philosophical Investigations* (1953) goes into great detail about the issue on 'representing' one's own actions. In §§302, 613-614, 616, 622 or 628, the argument exposed is that we can't talk about an intermediate capacity, faculty or 'motive' which leads us to the end an action is. There is no act of will in which a 'cause' promotes an action. *We are our actions.* In this sense, the assumption of Rousseau (see note 19) that the law is a representation of the will is absolutely mistaken. There is no such representation power because our will is always particular as individuals, and a *representation* is some sort of 'intermediate element' we don't need. We have to avoid the idea of mediator that must pace the law with the people behind it. This could solve the problem of the Rousseau's paradox about who's representing who when the Republic is a Constituent Assembly. *Confer* with A. Biral, *Rousseau: la sociedad sin soberano* [Rousseau: society without sovereign], [w:] *El contrato social en la Filosofía Política Moderna* [Social Contract in Modern Political Philosophy], red. G. Duso, Res Publica, Valencia 2002, s. 193-239. Let us finish the reference to Wittgenstein with his avoidal in the same text of the concept of 'following a rule' as a non-sense: C. Wright, *Rule-following without Reasons: Wittgenstein's Quietism and the Constitutive Question*, [w:] "Ratio: An International Journal of

being because I am one, because I cannot delocalise as such. I can imitate the action of another, in which I can recognise myself and represent, which I can *not be*. *Because I am equal and at the same time we differentiate ourselves by action*, I can want to use an example[32].

The 'other' appears to me always in its particular manifestations, in the actions that give it its position. They are what make it recognisable for me as a particularised man, susceptible to imitation, in other words, to repeating his action *as if* it were mine. It is not a mental experience like, when all is said and done, desire, intention and decision. And that is why recognition can only be based on biography, on memory, on common history and on the remembered account of actions. *What has been done by others puts me in my position and, at the same time, it exhorts me*.

IV.I. *How the law recognises an individual. The historical explanation*

The Treaty of Lisbon of December 2009 ended in an interesting way. At the final Act of the Intergovernmental Conference which, unlike the Protocols, was not a part of the Treaty, there were no fewer than 65 Declarations. Although they can be used by the courts as contextual criteria, they are not included in the achievements of the Treaty itself. They are background apostilles and corollaries whose purpose is for some of the signatory countries of the document to have the last word in an interesting way. The last 15 declarations have not been signed by all the member states, some individual and others collective. In June 2008, the Treaty of Constitution had been rejected by the Irish people and the solution to this crisis involved another meeting of the Council of Europe (18-19 June 2009) "with a view to returning the trust of and responding to the concerns of the Irish people"[33], which consisted of matters related not only to fiscal independence, but also to its military neutrality and its sovereignty over social matters such as abortion, education and the family. The heads of the States of the Union at the meeting declared that its content was '*fully compatible*' with the Treaty of Lisbon and did not require a new ratification of said Treaty. The affair was solved with the addition

Analytic Philosophy" 2007, 20 (4), s. 481-502 and M. Williams, *Blind Obedience: Rules, Community and the Individual*, [w:] *Wittgenstein's Philosophical Investigations: Critical Essays*, red. M. Williams, Rowman & Littlefield Publishers 2007, s. 61-92.

[32] The concept of *Aufforderung* [exortation, appeal, demand] presented by Fichte is quite eloquent in this matter. Theirs is a force of acknowledgement between two human beings aware of their presence as human beings. This acknowledgement is stressed as an *Anerkennung*, a 'recognition'. Axel Honneth has worked the pragmatics of this term regarding the concept of 'reification' as the oblivion of the recognition's attitude. Reification is 'to make an object' out of what can't be an object *via* a contemplative distance: out of oneself and our desires and will, out of the others, or even our surrounding world. See in this sense Honneth's *Tanner Lectures* hosted in http://www.tannerlectures.utah.edu/lectures/documents/Honneth_2006.pdf.

[33] R. Alonso García, *op. cit.*, s. 52.

of an annexe. Shortly afterwards, the Czech president (28-30 October) repeated the type of demands in the light of his concern for the fact that the full application of the Charter of Fundamental Rights could result in a claim for the assets confiscated from thousands of German citizens after their expulsion from the southeast region after the Second World War. The solution was another agreement (this time beyond even the Council of Europe) in which they undertook to attach another new protocol to the Treaty of the Union. It was another exception to the rule.

Turning the matter of legislation into a question of annexes and confusing *description* with the notion of *justification* (explanation) was to be the result of the short-sightedness of a certain type of legal positivism. This is what we have sought to present here[34].

Attempting to reduce the notion of explanation to a type of deduction from universal principles to particular cases (*from top to bottom*) or completing the manoeuvre in the opposite direction to connect the specific results in a generalisation on an accounting scale (*from bottom to top*) are simply equally bad solutions. *Rules and regulations have* to be disassociated from bad associations. "The best description is a copy: a model that is identical to its original in every way. In general, a copy does not reach such perfection, a copy does not identify with its prototype, and in relation to certain properties, to certain perspectives [the matter is that] we see in *the description an act* [of] *projecting on a model* […] *Describing is therefore not knowing (since even redoing is not knowing). The purpose of knowledge of the world cannot be its reduplication*"[35]. Particularity should not be 'redone' as in the general act, but rather it should be moulded to its form and generality should be drawn from it. Describing is creating another type of model[36]. "There seems to be no fundamental difference between describing and explaining. Simply the model used in an explanation seems to be more complex than the model used in a description"[37]. *Mímesis* reappears on stage. In both activities, the operation is that of representing a set of elements instead of another, which are what lay down the network of relations. Thus, that is where *rules*

[34] There is a Kantian way of state the foundations of a *common law* that stems from the idea of 'rule' as an universal mandatory concept (*vide*: J.L. Villacañas, *Res Puplica. Los fundamentos normativos de la Política* [Res Publica. The normative foundations of Politics], Ediciones Akal, Madrid 1999). Hans Kelsen or Ernest Beling declare themselves 'Kantians'. Kelsen sought thus the *Grundnorm* [Grounding Norm] as a transcendental content of law. The obligatory force that this norm would have, would make it unnecessary 'to defend' by other means: In *Wer soll der Hüter der Verfassung sein?* (1931) [Who should be the protector of the Constitution?] we could see the question as trifling, as the Constitution, if it is a *Grundnorm* (and should be one) needs of no protection. It is a transcendental norm.

[35] L. Apostel, *Observacions sobre la noción de explicación*, [w:] *La explicación en ciencias*, red. J. Piaget, Ediciones Martínez Roca, Madrid 1977, s. 199-200.

[36] *Ibidem*, s. 201

[37] *Ibidem*.

and regulations are to be found. At the beginning of the 19th century, the predominant conception of science had become deeply anti-historicist. It was understood that all historical explanation came to individuals in such a way that it contained an abundance of contingent issues that could not be generalised and that were unrepeatable and sporadic. There is a clear difference between the *initial* conditions, the initial position of the elements, which is *contingent*, and the *universal laws* that constitute the theory itself. Accordingly, a distinction is possible between *what comes with need* and that which exists only in a given situation, not derivable from laws. From this point of view, what is contingent, what is particular explains nothing because what it explains are the laws. As we have said, the law cannot and has no interest in recognising what is unique in it. It is subsumed in it and it is applicable to every case. *There can be no science or descriptive law.* And yet, what will enable Science to develop what is known as *'narrative explanation'*, or *'historical explanation'* will be a return to contingency.

This type of explanation takes into account the relationship between *the individual* and *his context*, between the individual and his circumstances. "No event is unique in itself, but rather only in the context of certain descriptions […] Any event, no matter how repeatable it may be in one way, can be part of a generalisation when the event is described in another way"[38]. An event is made particular by the context. The law can come to individual events and it does so by including its circumstances fairly as explanatory. It is suffice to consider that, in the two sides of contingency, we have, despite everything, (i) *each of the individual acts* can be seen as *a link in the causal chain* that has led, as if by need, to the present state of the community or the individual. The explanation, the law of what the explanation is, depends on a history that cannot be ignored; and (ii) the community, the individuals, are not previously 'coordinated' with their circumstances. They are unique. The historical character of the community action, of its particular history is neither reduced nor needs reducing. These features are, of course, in spite of everything, *stable*. This characteristic of stability will be essential as a replacement for logical need and alludes directly to a history. The succession of actions is a type of stability. What Europe is, *what it is* and *should be*, that is, its explanation, cannot be so distant from each other as a law that seeks

[38] S.F. Martínez, *Explicación en Biología: Historia y Narrativa* [Explanation in Biology: History and Narrative], [w:] *De los efectos a las causas. Sobre la historia de los patrones de explicación científica.* [From effects to causes. On History of Scientific Explanation Patterns], Instituto de Investigaciones Filosóficas, UNAM, México 1997, s. 154-155; R.J. Richards, *La estructura de la explicación narrativa en historia y biología* [Narrative Explanation's Structure in History and Biology], [w:] *Historia y Explicación en Biología*, §XII, red. S. Martínez, A. Parahona, Ediciones Científicas Universitarias, FCE-UNAM, México 1998, s. 212-245; D. Hull, *Sujetos centrales y narraciones históricas* [Central Subjects and Historical Narratives], [w:] *ibidem*, §XIII, s. 247-270. We could then point it as a counterargument against von Kirchmann's assessment (See note 26).

to represent it believes. We have a context that is often shared owing to the fact that we have a common history. A context and tradition formed by the memory of our actions. That will be what, as a law, will make Europe unique.

IV.II. *How the private individual recognises a law (or recognises himself in a law). Ernest Sosa and Virtue Epistemology*

If the law is to be convenient for man, if it has to recognise him and he recognise it at the same time, this is as valid as the affirmation of he who justifies it. In turn, the law can then be said to be justified. This case of justified application can lead to a number of substantive consequences for the content it has to have. Said consequences will be drawn here in the epistemological entente Ernest Sosa has classified as an Virtue Epistemology[39], and it will conclude that "the democratic procedure of deliberation is also appropriate on an epistemic scale for producing fair results that are respectful of certain substantive values"[40], in other words, on an individual epistemic scale, the justification will be transformed into a justification of rules and regulations on a general scale.

Ernest Sosa conceives his proposal as an exercise of recovery of the best epistemic qualities the foregoing justification theories can offer. In the process for the founding of a *belief* (which operates like a *decision*), the positions of *foundationism* in Epistemology and those of *coherentism* have arguments of value for the discussion. *Coherentism* is strengthened by highlighting the communication and interrelation between the proposals made by beliefs. Said proposals lend each other mutual support and are reinforced in a stable system that is ratified by the absence of internal contradiction. The problem is that this would place us in a hypothetical situation in which it would be possible to legitimate a certain belief based only on the network of its relations of coherence and not on its substantive content because it is held by someone or because it coincides with reality. This can involve the usable part of the alternative epistemological position: *foundationism* maintains that the proposals justify a belief and that a belief B_1 is justified by virtue of the relationship of involvement it has with another belief B_2. Said relationship is inferential (*inferential supposition*) and the infinite 'return' of implications stops because there are certain beliefs that have an intrinsic characteristic

[39] As it is presented his own view of Epistemology at a first time in E. Sosa, *The Raft and the Pyramid: Coherence versus Foundations in the Theory of Knowledge*, [w:] *Midwest Studies in Philosophy* 1980, s. 3-25; Other works more recently published are E. Sosa, *Knowledge in Perspective*, Cambridge University Press, 1991; E. Sosa, *A Virtue Epistemology. Apt Belief and Reflective Knowledge*, Vol. I, Oxford University Press, 2007 and in 2009 a whole number of *Teorema. International Journal of Philosophy.* (vol. XXVIII/1) was devoted to him and his impact in contemporary Epistemology.

[40] J.L. Martí, *La república deliberativa. Una teoría de la democracia* [The deliberative Republic. A theory on democracy], Ediciones Marcial Pons, Madrid 2006, s. 179.

that furnishes them with foundation. The others support their content in them. They are terminal points on the inferential chain. These base proposals of the system can be classified as *substantive* or material. The disposition of this type of belief for acting as a base for the others, its expertise when offering good epistemological results (coherent with each other and reliable in their trade with the world) is called *aptness* or *warrant*. In addition, Sosa avoids the problem of explaining the logical jump between the substantive beliefs that connect reality with the terrain of legal or logical proposals that come from them. This is the reason for a new use of the classic term 'virtue' as the *substantive quality* of an agent and which is essential if we want to justify any of its beliefs. Sosa's merit lies in having moved the case on the justification of a belief from the belief itself to the individual holding the belief. The belief is particularised. The subject is he who holds a virtue and *that is why* the belief is virtuous, or, if you prefer, useful. In one classic example, a subject sees 'without counting' a white surface with 48 black dots for 3 seconds and then he does the same with an identical surface with only 3 dots. When the subject states that the first surface has 48 dots and the second has 3, the subject will have formed in both cases *true beliefs* based on his perceptive experiences. However, the second proposal could be considered justified since it is quite probable (according to the *epistemological virtues* we suppose of the subject) that if the subject were to be shown a surface with 2 or 4 dots, *he would not believe* that it had 3. In addition, if the subject were shown a surface with 47 dots or with 49, we would be hard pressed to assign him the virtue of said distinction and, therefore, we would have to consider his belief of the fact that the surface has exactly 48 dots *justified*. The condition of justification that is formulated adopts the expression of a counterfact: If S were to believe that *p* in situations that are similar to the present, then *p* would be justified. Sosa has labelled this the *safety condition* and it is that which guarantees that the 'virtue' is *stable on an epistemic scale*, in other words, that the quality is not the result of chance that cannot be repeated, but rather of a *stable disposition* of the subject, one of his structural characteristics. This suggests a repetition in time of the same type of action. *A historical component*. The key point is that we have moved the question of the rules and regulations of procedures to one about what we can found in persons who maintain the beliefs and where it is said that 'belief' is the same as 'law', 'rule', 'legal proposal'. They are the features of its character, its virtues, those which guarantee the other affirmations for us. In the same way that "it first of all deals with the love for truth, but also for impartiality, the opening-up of viewpoints, courage and intellectual humility"[41], its substantiveness also includes *freedom*, *political*

[41] J.J. Moreso, *Las virtudes epistémicas de la república deliberativa*, [w:] *Diritto & Questioni Pubbliche. Rivista di Filosofía del Diritto e Cultura Giuridica*, n. 9, Università degli Studi di Palermo, 2009, s. 317.

independence, dignity, *equality*, *responsibility*, *tolerance* and the series of fundamental rights that are usually included in the titles of a constitutional text. These are also 'virtues' that can be found as intrinsic qualities and which transfer their foundational strength to the other proposals of the legal system. Thus, we could consider that the basic, fundamental virtues we suppose for citizens are included in, for example, the Charter of Human Rights.

The *justification* of the procedure whereby decisions of authority are taken in society has exactly (by analogy) the same developments as those mentioned here.

The *virtue* or *correction* of a legal proposal might seem to be relevant as a reason for its inclusion in a canon of law. However, its *intrinsic value* cannot be disassociated from the procedure whereby it is legitimated, which in our case is *deliberation*, democratic decision, which is formal, or from its *allocation* to the *subjects of law*. In a democracy, the process of deliberation is considered as a *good in itself*; it is what gives everything its sense and it is also substantive as a result. *There is no democracy without participation*. Similarly, part of that substantiveness comes from the fact that it is a formal characteristic of the system. *There is no legitimacy if the subjects of law do not 'appear' in the deliberation*. According to Sosa, a *virtue is the capacity supposed of an individual for founding or justifying* a belief. This is what *fundamental rights* are. Consequently, they are also *substantive* and, insofar as each attribution of law, the rulings, recognises these virtues in the individual, the same democratic structure continues a history of *good decisions* on which the law in question is based. The character of *stability* of a *virtue* in this sense refers to this.

The epistemic justification based on the recognition of a substantive virtue leads to the justification through rules and regulations in a system that seeks its development. Neither of the two justifications can avoid the idea of a *record of decisions* that are nothing more than History and, in our case, no Constitution that ignores the common history that can be drawn from a community will ever represent said community.

Ricardo Gutiérrez Aguilar

DUCH PRAWA W EUROPIE: TEORIA „PRZYKŁADU" I „ROZPOZNANIE"

Streszczenie

Artykuł przedstawia rozważania nad właściwym znaczeniem pojęcia prawa, wpisujące się w dyskusję na temat jego konkretnego i abstrakcyjnego ujęcia. Posługując się arystotelesowską ideą *phrónesis*, autor stara się rozstrzygnąć problem metodą konceptualnej podróży, rozpoczynającej się od *Ius romanum* w czasach starożytnych, biegnącej poprzez nowożytny Kodeks Napoleona i znajdującej swój kres we współczesnym projekcie Konstytucji Europejskiej.